

THIS OPINION WAS NOT WRITTEN FOR PUBLICATION

The opinion in support of the decision being entered today (1) was not written for publication in a law journal and (2) is not binding precedent of the Board.

Paper No. 13

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

Ex parte ROGER BRUCE CLAUSEN, JOHN A. GRESSMAN,
PHILIP A. MUNDY, WILLIAM C. SCHIEFERSTEIN
and DAVID A. BEARD

Appeal No. 1999-2685
Application 29/078,408¹

HEARD: DECEMBER 8, 1999

Before McCANDLISH, Senior Administrative Patent Judge, McQUADE
and NASE, Administrative Patent Judges.

McQUADE, Administrative Patent Judge.

DECISION ON APPEAL

Roger Bruce Clausen et al. appeal from the final
rejection of the following claim for an ornamental design:

¹ Application for patent filed October 17, 1997.

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The ornamental design for an automatic washer spin basket as shown and described.

As characterized in the appellants' brief (Paper No. 8),
the claimed design

is directed to a spin basket having a plurality of holes and wherein the holes in the basket are clearly arranged in a downwardly running diagonal pattern. . . . As a result, the ornamental design . . . visually presents a basket which appears to have holes arranged along a plurality of downwardly spiraling lines. In contrast, therefore, to a uniform, symmetrical hole pattern, the present invention conveys a visual impression of spin basket rotation [page 2].

The item relied upon by the examiner as evidence of obviousness is:

Fanson et al. (Fanson)	4,888,965	Dec. 26, 1989
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The items relied upon by the appellants as evidence of non-obviousness are:

The 37 CFR § 1.132 Declaration of Roger B. Clausen et al. filed July 16, 1998 (Paper No. 4).

The 37 CFR § 1.132 Declaration of Roger B. Clausen filed January 11, 1999 (Paper No. 6).

The claim stands rejected under 35 U.S.C. § 103(a) as being unpatentable over Fanson. According to the examiner, "[t]he basic wash basket (26) to Fanson discloses

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substantially the same article as the applicant's [sic] claimed design. Any differences in detail that may exist between the applied art and the instant claim are believed to be minor in nature and have little or no design significance" (Office action dated April 16, 1998, Paper No. 3).

Reference is made to the appellants' brief (Paper No. 8) and to the examiner's final rejection and answer (Paper Nos. 5 and 9) for the respective positions of the appellants and the examiner with regard to the merits of this rejection.

In determining the patentability of a design, it is the overall appearance, the visual effect as a whole of the design, which must be taken into consideration. In re Rosen, 673 F.2d 388, 390, 213 USPQ 347, 349 (CCPA 1982). Where the inquiry is to be made under 35 U.S.C. § 103, the proper standard is whether the design would have been obvious to a designer of ordinary skill of the articles involved. In re Nalbandian, 661 F.2d 1214, 1216, 211 USPQ 782, 784 (CCPA 1981). As a starting point, there must be a reference, a something in existence, the design characteristics of which are basically the same as those of the claimed design in order to support a holding of obviousness. Such a reference is

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necessary whether the holding is based on the basic reference alone or on the basic reference in view of modifications suggested by secondary references. In re Harvey, 12 F.3d 1061, 1063, 29 USPQ2d 1206, 1208 (Fed. Cir. 1993); In re Rosen, supra. De minimis changes which would have been well within the skill of an ordinary designer in the art do not create a patentably distinct design. In re Carter, 673 F.2d 1378, 1380, 213 USPQ 625, 626 (CCPA 1982) (also see In re Cooper, 480 F.2d 900, 902, 178 USPQ 406, 408 (CCPA 1973); and In re Lapworth, 451 F.2d 1094, 1096, 172 USPQ 129, 131 (CCPA 1971)).

The wash basket 26 disclosed by Fanson is a generally cylindrical structure having rows of perforations 72 (see Figures 2 and 3). Arguably, this wash basket satisfies the Rosen requirement for something in existence having design characteristics which are basically the same as those of the claimed design. Nonetheless, a comparison between Figures 2 and 3 in the Fanson reference and Figures 1 and 2 in the instant application shows that the perforations in the Fanson wash basket are not arranged in the distinctive downwardly spiraling pattern of the claimed design. This downwardly

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spiraling pattern imbues the claimed design with an overall visual effect which differs significantly from that of the Fanson design. Thus, the examiner's position that the differences between the two designs are minor or de minimis having little or no design significance is not well taken.

In light of the foregoing, we conclude that the Fanson reference fails to establish a prima facie case of obviousness with respect to the claimed design.² Accordingly, we shall not sustain the standing 35 U.S.C. § 103(a) rejection of the claim.

The decision of the examiner is reversed.

REVERSED

HARRISON E. McCANDLISH)	
Administrative Patent Judge)	
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JOHN P. McQUADE)	BOARD OF PATENT

² This being so, it is unnecessary to delve into the merits of the appellants' evidence of non-obviousness.

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Administrative Patent Judge)	APPEALS AND
)	INTERFERENCES
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JEFFREY V. NASE)	
Administrative Patent Judge)	

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